93-7901 No. ____ (2) ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court has established two standards for determining whether a denial of relief to a habeas corpus petitioner would constitute a miscarriage of justice, requiring the consideration of an otherwise-barred constitutional claim. Where the claim bears solely on a petitioner's capital sentence, Sawyer v. Whitley, 112 S.Ct. 2514 (1992) held the test is whether the petitioner can "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty . . ." Where the claim bears on the integrity of a conviction, Kuhlmann v. Wilson, 477 U.S. 436 (1986) held that the test is whether the petitioner can make a "colorable showing of factual innocence."

This case presents two questions regarding these standards:

1. Whether the Sawyer standard or the Kuhlmann standard governs a claim regarding the determination of guilt or innocence in a capital case.

2. Whether, if Sawyer's test applies, it requires a habeas petitioner to show that the evidence of guilt was constitutionally insufficient to support conviction.

This case also presents the Eighth and Fourteenth Amendment question left open by Herrera v. Collins, 113 S.Ct. 853 (1993):

3. What constitutes the "truly persuasive" showing of innocence which will entitle a death-sentenced habeas petitioner to a hearing at which he can establish that his execution would violate the Constitution because he is actually innocent of the crime.

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Petitioner Lloyd Schlup prays that a writ of certiorari will issue to review the judgment of the courts below, which denied him habeas corpus relief from a death sentence imposed for a crime he did not commit.

OPINIONS BELOW

The opinion of the divided panel of the United States Court of Appeals for the Eighth Circuit is published as Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993); a copy is attached as Appendix A to this Petition. The Order of the Court of Appeals denying Petitioner's Suggestion for Rehearing En Banc, with a dissent by Chief Judge Arnold and two other judges, is attached as Appendix B to this Petition. The decision of the United States District Court for the

Western District of Missouri is unpublished, and is attached as Appendix C.

JURISDICTION

The decision of the Court of Appeals was issued on November 15, 1993. A Petition for Rehearing En Banc was denied on November 17, 1993. This Petition is being filed within 90 days of the earlier of those two dates.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2244(b), which provides:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the other application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This case also involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

The decision below affirmed the summary dismissal of Petitioner's second federal habeas corpus petition, which alleged that his constitutional rights were denied at trial and in subsequent proceedings, and that he was actually innocent of the crime for which he convicted and sentenced to die.

1. The Trial, Appeal, and Prior Postconviction Proceedings.

Petitioner Lloyd Schlup was convicted and sentenced to death for the murder of Arthur Dade, a fellow prisoner at the Missouri State Penitentiary.

From the outset, Mr. Schlup denied any involvement in Mr. Dade's murder. Although he was arrested within minutes of the murder, no physical evidence linked him with the crime. The evidence against him consisted of the testimony of two correctional officers who claimed to have witnessed the murder--from a distance. Only one of these witnesses actually appeared before the jury; the testimony of the other was presented by deposition.

Petitioner's trial lasted only two days. He was represented at trial by court-appointed counsel, whom it is undisputed failed to interview several known eyewitnesses.[1] After his conviction was affirmed on appeal, State v. Schlup, 724 S.W.2d 236 (Mo.), cert. denied, 482 U.S. 920 (1987), he filed for post-conviction relief in the Missouri courts claiming, among other things, ineffectiveness of his trial counsel. The petition was quickly dismissed, with no inquiry into the evidence of Mr. Schlup's innocence.

> An evidentiary hearing was held at which Schlup's trial counsel testified, and the motion court ruled against Schlup, finding that his trial counsel had been effective. See Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., Nov. 6, 1987). The court accepted trial counsel's testimony, and found that the witnesses who were not interviewed were either not made known to trial counsel by Schlup or "were known not to have information which would assist the defense." Id. at 4.
>
> Schlup appealed this adverse decision, specifically alleging that trial counsel was ineffective for not interviewing the aforementioned witnesses. Appellant's Brief at 4, Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (No. 70694). The Supreme Court of Missouri ignored this issue when it affirmed the motion court's decision. See Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (en banc).
>
> Schlup then raised the issue in his pro se petition for federal habeas filed in the Eastern District of Missouri. ... The district court ruled summarily and without any basis that the claims raised in paragraphs A(1) and A(5), along with others, were "barred from further consideration" because of Schlup's "failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in [his] post-conviction proceedings." Schlup v. Armontrout, No. 89- 0020C(3), slip op. at 6 (E.D. Mo. May 31, 1989), aff'd, 941 F.2d 1062 (8th Cir. 1991), cert. denied, 112 U.S. 1273 (1992).

Appendix A-25-26.

Thus, despite the efforts of Mr. Schlup and his family to get counsel to investigate the case, at no time in this first round of federal and state postconviction proceedings did any lawyer representing Mr. Schlup contact the witnesses who could testify in his behalf. In the initial state postconviction hearing, Mr. Schlup's appointed counsel was forced to go forward, although he had done no investigation and informed the trial court he was unprepared; after the trial court threatened counsel with jail if he did not go forward that day, as a result of an ex parte telephone call from the Chief Justice of the Missouri Supreme Court, William Billings, insisting that the case be moved along. See Appendix C-5. Mr. Schlup's habeas counsel also interviewed no witnesses--claiming that he was fearful of retaliation from Justice

[1]The murder happened in a crowded cell block of the Missouri State Penitentiary. Defense counsel made no attempt to canvass the crime scene or talk to several inmates who told prison officials that they saw the crime.

Billings, having previously subjected to disciplinary proceedings by the Missouri Bar (which exonerated him) as a result of a complaint against another Judge. Id.

Mr. Schlup was denied relief in both the state and federal courts, with no judge ever having seen or heard from the eyewitnesses to the crime who swear he was not involved.

2. The Proceedings Below.

After certiorari was denied from the first habeas appeal, the case was taken over by Petitioner's present counsel from the Missouri Capital Resource Center--whom the dissent below characterized as "the only truly competent counsel to have represented Schlup since the beginning." Appendix A-27, Heaney, J., (dissenting). Through those counsel, Mr. Schlup, for the first time, was able to gather and present the evidence of his innocence. The evidence was first submitted to the Missouri Supreme Court in the form of a renewed petition for a writ of habeas corpus, and an objection to the setting of a new execution date. Although Missouri law nominally places no limit on the time and opportunities for a claim of newly discovered evidence,[2] the submission was rejected on procedural grounds without any consideration of its substance. State ex rel. Schlup v. Delo, No. 74608 (Mo., March 5, 1992) (unpublished).

[2]A new trial on the basis of newly discovered evidence may be granted under Missouri Rule 91 (habeas corpus). Wilson v. State, 813 S.W.2d 833 (Mo. 1991) (en banc). ("Newly discovered evidence, if available, may better serve Wilson in a petition for writ of habeas corpus under Rule 91, see White v. State, 779 S.W.2d 571, 573 (Mo. banc 1989) . . ."). There is no time limit for the filing of a petition for writ of habeas corpus in Missouri.

Petitioner then filed the second habeas corpus petition in the District Court below. The petition was accompanied by affidavits of eyewitnesses who had never previously been contacted by Mr. Schlup's counsel, as well as statements from many of these witnesses that were acquired during the initial investigation by the Missouri prison authorities. In response, the State of Missouri submitted a number of witness statements from prisoners and other witnesses who were never called at trial--which added substantial additional support to Petitioner's claims. The resulting mass of new evidence--which was rejected by the District Court without a resolution of the factual issues it raises--was summarized in some detail by Judge Heaney's dissenting opinion below:

> Schlup presents five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear willing to give their testimony in open court. These witnesses describe firsthand the murder of "Stump" Dade, indicating unequivocally that Lloyd Schlup was not a perpetrator and was not even present.

Appendix A-14.[3] Although these witnesses were prisoners at the time, there is an unusual reason to credit their testimony: they are black and Mr. Schlup is white. Dade was a black man, and his murder may have been racially motivated. Those involved were alleged to be members of a white supremacist group in the prison. Pierce is also black and adds the following: "I have no reason to lie for a white guy.... I know for certain that Lloyd Schlup did

[3]The evidence was summarized in greater detail in a factual appendix to the Petitioner's briefs filed in the Court of Appeals, a copy of which is attached to this Petition as Appendix D.

not kill Arthur Dade, and that he was not even present when Dade was killed."

In addition to the eyewitness testimony discussed above, Schlup also presents this court with new evidence in support of the alibi defense he presented at trial. That defense consisted of the testimony of several prisoners that Schlup had walked ahead of them to the dining room, the testimony of Lieutenant Faherty that he had spoken to Schlup outside the dining room, and the videotape that shows Schlup as the first inmate to arrive in the dining room.

The importance of the videotape is in the time lapse between when Schlup arrived, when the guards received a call over their radios about the attack on Dade, and when O'Neal and Jordan arrived. No one disputes that Schlup was first in line for lunch on February 3, 1984. The surveillance videotape of the dining room confirms this fact. According to the videotape, one minute and five seconds elapsed from Schlup's entrance into the dining room until the guards received a radio call about the fight. Twenty-six seconds after the guards responded to the radio call O'Neal ran into the dining room dripping blood. Prison investigator George Brooks testified at trial that one could run from the scene of the crime to the dining room in just over thirty seconds, with a brisk walk taking over a minute.

At trial it was believed that the radio call to which the dining room guards can be seen responding was made several minutes after the stabbing had occurred. Captain Eberle testified that he had radioed for help when he first arrived on the scene, which was several minutes after the stabbing. This would arguably have given Schlup time, as the state asserted in its closing arguments, to get to the dining room one minute before the call went out over the radio.

Schlup presents new evidence on this point, however, evidence that apparently was available at the time of trial but was not presented to the jury due to the ineffectiveness of Schlup's trial counsel. John Green, the eyewitness whose testimony is discussed above, did more than simply watch the stabbing on February 3. Sergeant Flowers called out for someone to call the base, and Green did just that. He told the prison investigators about this phone call when he was first interviewed: "I heard Sgt. Flowers calling for officers cause they had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." Excerpt of Transcript of Inmate Interviews, Exhibit 4A in Support of Petition for Writ of Habeas Corpus (interview of John Green). This phone call took place just after he saw "inmate Dade fall right there in front of the office." Id.

Green's affidavit provides greater detail: "When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast." Affidavit of John L. Green, at 4 (Sept. 7, 1993). [FN6]

Lieutenant Faherty has also expanded on his earlier trial and deposition testimony. He testifies that he was on duty at T-3, a door about halfway between Schlup's cell and the dining room that is kept locked except when inmates are moving from one place to another. When T-3 was opened from base control at his direction, he saw Schlup "coming down the corridor.... He was walking a leisurely pace with his hands in his pockets." Affidavit of Robert Faherty, at P 4 (Oct. 26, 1993). Schlup stopped at a window to yell at someone outside, Faherty reprimanded him, and Schlup walked to T-3. Faherty "patted him down, and he went to the dining room. [Schlup] was not perspiring or breathing hard, and he was not nervous." Id. Faherty was relieved from T-3 shortly after Schlup passed through, and Faherty then went to the dining room. He estimates that Schlup was in his presence (presumably from the corridor the other side of T-3 and into the dining room) for two-and-a-half to three minutes. It would take Schlup another thirty seconds to walk from his cell to where he first entered Faherty's line of sight. Id. at P 6. Counting the minute in the dining room prior to the radio call (when he was presumably in Faherty's presence as well), Schlup left his walk at least three to three-and-a-half minutes before the radio call. [FN7] If the radio call came in response to John Green's phone call, it is impossible, as Faherty asserts, for Schlup to have participated in Dade's murder.

Given the timing of this call for help and the evidence presented at trial (the videotape, the testimony of Lieutenant Faherty, and the testimony of Brooks on how long it takes to move from the scene of the crime to the dining room), it is not possible that Schlup could have participated in Dade's murder and been in the dining room as the videotape indicates. In short, Lloyd Schlup could not have been in two places at the same time. O'Neal arrived nearly thirty seconds after the radio call, and the prosecution's testimony establishes that he took off at a run. He was followed into the dining room by Randy Jordan. Rodnie Stewart had already been detained. Meanwhile, as Schlup has maintained since the beginning, he was simply in the dining room eating his fish sandwich.

Id. at 20-24.

In addition to this, during the proceedings below Petitioner's counsel developed important evidence tending to impeach the testimony of the two correctional officers whose witnesses supported the prosecution's case at trial. One of them, John Maylee, turned out to have three prior felony convictions of which the jury was never told. See Appendix A-33, n.14. The other, Roger Flowers, was fired from the prison shortly after the Dade murder; and a number of the newly located witnesses testified (as did Mr. Maylee) that Mr. Flowers was away from his post, and did not actually witness Arthur Dade's murder, as he had testified at trial.

Without hearing any of this evidence, the District Court and the panel majority below found Petitioner's showing of innocence insufficient--although "the District Court indicated that Schlup presented a stronger case than did [Leonel] Herrera...." Appendix A-33.[4] The dissenting judge of the panel (and three dissenters

[4]The Court of Appeals majority was skeptical of Petitioner's new evidence--largely because it came from prisoners, many of whom had failed to report their observations to prison investigators immediately after the crime. See App. A-11. Because none of these prisoners had ever been called to testify, there is no definitive way to gauge their credibility or the reasons for these apparent inconsistencies. However, as Judge Heaney observed with regard to one of them, John Green:

> While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known.

App. A at 15, n. 2 (Heaney, J., dissenting). Furthermore, since it was the state which disclosed Green's statement in the course of habeas proceedings, and his most recent statement was obtained only after a concerted effort to locate him at his job at a dairy farm in south-central Nebraska, the possibility of collusion between Green and petitioner is inconceivable.

from the denial of rehearing en banc) disagreed, finding that, on its face, the evidence was "truly persuasive." Ibid.

The majority of the Court of Appeals panel held that Mr. Schlup's constitutional claims were barred, and that his proffered evidence of innocence was insufficient to preclude his execution under the Eighth Amendment. In upholding the procedural bar, the panel adopted by reference the District Court's decision that there was no "cause" for the failure to previously present the new evidence of innocence, despite the fact that Mr. Schlup had repeatedly asked his appointed lawyers to do so. Appendix A-3; see Appendix C-4-6. The panel majority found that the "miscarriage of justice" exception to the rule of procedural default did not apply, holding the new evidence did not meet the standard of Sawyer v. Whitley, 112 S.Ct. 2514 (1992), which it equated with the constitutional rule of Jackson v. Virginia, 443 U.S. 307 (1979). Appendix A-5. Applying similar reasoning, the Court of Appeals panel rejected Mr. Schlup's claim that, because he was actually innocent of the crime, his execution would violate the Eighth Amendment. Appendix A-12. Senior Judge Heaney dissented from the panel opinion, reviewing the evidence of innocence at length and concluding that it met both the test of a "miscarriage of justice" under Sawyer, and a "truly persuasive" showing of actual innocence under Herrera v. Collins, 113 S.Ct. 853 (1993). An expedited petition for rehearing en banc was rejected, over the dissents of

Chief Judge Arnold and two other active Circuit Judges. Appendix B.

On November 18, 1993--the day after the Court of Appeals denied rehearing en banc, and the day before Mr. Schlup's scheduled execution--the Governor of Missouri granted a stay of execution and ordered a special panel to be assembled to evaluate the evidence of Mr. Schlup's innocence, and make recommendations to him regarding the exercise of his clemency power.[5] That process is continuing as of this date.

REASONS FOR GRANTING THE WRIT

As the dissenting Circuit Judge below observed, "if ever there were a case in which the Supreme Court might wish to clarify the law on this issue, this is the one. Schlup has presented a strong case of actual innocence...." Appendix A-30. The extraordinary facts of this case, and the decisions below, frame quite precisely several issues regarding claims of innocence in capital cases, on which lower courts are in need of this Court's guidance.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIVISION AMONG THE COURTS OF APPEALS REGARDING THE TEST TO APPLY TO CLAIMS OF MISCARRIAGE OF JUSTICE AT THE GUILT PHASE OF A CAPITAL CASE.

The principal issue on which the judges of the Court of Appeals below were divided was whether Petitioner's miscarriage of

[5]The order from Missouri Governor Mel Carnahan staying Mr. Schlup's execution came shortly after a polygraph test was administered to John Green by Mr. Don Dunlap, a retired police officer who had served more than 15 years as Chief Polygraphist in the Kansas City, Missouri, Police Department. No deception was indicated when Green said that he saw the crime, Mr. Schlup was not involved, and he called b[illegible]e as soon as Officer Flowers told him to do so.

justice claim should be evaluated under the test of Sawyer v. Whitley, 112 S.Ct. 2514 (1992), or that of Kuhlmann v. Wilson, 447 U.S. 436 (1986). As summarized by the majority decision below:

> Sawyer dealt with the punishment phase of the criminal proceeding as opposed to the guilt or innocence phase of the trial. Therefore, appellant argues, with some justification, that Sawyer announced only a test for analyzing the fairness of the death penalty portion of a trial. And, the Supreme Court did say, in Sawyer, with regard to guilt or innocence:
>
> > Our standard for determining actual innocence was articulated in Kuhlmann as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' " Sawyer, 112 S. Ct. at 2519, n.5 (citations omitted).
>
> On the other hand, Sawyer says that "actual innocence" under the death penalty phase of a case must be determined by considering whether a "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. at 2523. Says appellant, this seemingly higher (penalty) test is necessary because the amorphous concept of being actually "innocent of death" requires a more objective standard. Id. at 2519-20. In other words, in the context of guilt or innocence of the crime itself, the concept of "actual innocence" is easier to grasp. Id. at 2520. Thus, the more subjective Kuhlmann test is sufficient.
>
> Whatever the merits of appellant's contentions, we do not write on a clean slate. We must reject appellant's argument because in this circuit "the new standard [required by Sawyer] applies equally to challenges to a conviction, not just challenges to a death sentence." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992). And, the imprimatur of this court en banc was stamped on the McCoy holding in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1820 (1993). Accordingly, we make our determination of whether Mr. Schlup's claim of actual innocence opens the gateway to our consideration of his constitutional claims on that basis.

Appendix A-4-5.

As Chief Judge Arnold noted in his dissent from the denial of rehearing below, there is real reason to doubt whether the Court in Sawyer intended to supplant the Kuhlmann test for claims of miscarriage of justice at the guilt phase of capital trials.

> In McCoy, we held that a miscarriage of justice for purposes of avoiding procedural defenses can be found only when petitioner has shown by clear and convincing evidence that but for the constitutional error', no reasonable juror could find him guilty. 969 F.2d at 651. The McCoy Court lifted this standard from Sawyer v. Whitley, 112 S.Ct. 2514 (1992), a case having to do only with the question of punishment, not that of guilt or innocence.
>
> As our panel in the present case acknowledged, there is some warrant for Schlup's argument that Sawyer was intended by the Supreme Court to apply only to questions of punishment, and that the Sawyer opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of Kuhlmann v. Wilson, 477 U.S. 436 (1986) (requiring a petitioner to show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt). See Sawyer, 112 S.Ct. at 2519 n.5.

Appendix B-1-2. As Judge Heaney wrote in dissent, the Eighth Circuit's McCoy decision effectively holds that Sawyer overruled Kuhlmann.

> Under the Supreme Court's decisions on actual innocence, the standard to be applied in this case is stated in Kuhlmann v. Wilson, 477 U.S. 436 (1986), in which Justice Powell stated the requirement
>
> > that the prisoner must "show a fair probability that, in light of all the evidence, ... the trier of fact would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.
>
> Id. at 454 n.17 (Powell, J., for a plurality) (quoting Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) (footnote omitted)) (emphasis in original). I believe that Schlup has met this standard, but, as the majority correctly notes, our court has applied a different standard,

> essentially reading the Supreme Court's decision in Sawyer as implicitly overruling Kuhlmann in this regard.

Appendix A 28-29. The Eighth Circuit's alteration of Sawyer to fit guilt phase issues such as those in this case was made graphically evident in the concluding passage of its opinion on this issue:

> Thus, Mr. Schlup, like Herrera, attempts to seek a federal court retrial of his state court prosecution and falls well short of showing "by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder.]" Sawyer, 112 S. Ct. at 2523.

Appendix A-11 (brackets in original). By so modifying Sawyer's rule, the Eighth Circuit appears to have misunderstood Sawyer's logic and overlooked the Court's citation of Kuhlmann as the standard for guilt phase claims. More importantly, the decision below--which acknowledged doubts about its correctness, and was issued over the objections of four dissenting Circuit judges--is part of a substantial split among the Courts of Appeals with regard to this issue. At least two other circuits have held to the contrary, that Sawyer should be limited to claims affecting the propriety of death sentences in capital cases and that Kuhlmann and McCleskey still apply to constitutional claims raising issues of innocence of the underlying crime. Montoya v. Collins, 988 F.2d 11, 13 (5th Cir. 1993); Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993); Campbell v. Blodgett, 982 F.2d 1321, 1331 (9th Cir. 1992). The Eighth Circuit's broad reading and application of Sawyer exceeds the scope for which that test was intended by the Court, and is in clear conflict with opinions from other circuits. For both these reasons, certiorari is appropriate here. Rule 10.1(a).

A resolution of this dispute is particularly important because of the gravity of the issues it involves, and the rapidity with which those issues often need to be resolved. In Missouri, as in many other states, there is a serious shortage of qualified counsel to represent capital defendants in post-conviction proceedings:

> A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. . . . This situation is not likely to be cured by the new provisions of the anti-drug abuse act of 1988 that require the appointment of counsel in capital habeas corpus proceedings.
>
> Capital inmates are almost uniformly indigent, and often illiterate or uneducated. Capital habeas litigation may be difficult and complex. Prisoners acting pro se, rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived. The belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness.

Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, 45 Crim. L. Rptr 3239, 3240 (Sept. 27, 1989). Mr. Schlup's case is anecdotal proof, as this Court is aware, habeas petitioners too often do not obtain counsel willing or able to investigate their claims of innocence until an execution is impending.[6] Where such investigations produce evidence of actual innocence, federal courts often find themselves forced to resolve the most serious and

[6]"It must be recognized that the growing death row population [in Texas] requires increased counsel resources, while the present system discourages the appointment of counsel." The Hon. Edith Jones, "Death Penalty Procedure: A Proposal for Reform," 63 TEX. B.J. 850, 851 (1990). Accord, see the briefs in this court by Petitioner and amici, Texas Criminal Defense Lawyers Association and the American Bar Association, in McFarland v. Collins, No. 93-6497.

fact-intensive sorts of claims, under expedited and difficult conditions. In such circumstances, clear guidance from this Court is especially important. Certiorari should be granted in this case to provide it.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SAWYER PRECLUDED RELIEF IN ALL CASES WHERE THE TRIAL EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION.

Not only did the Court of Appeals modify the Sawyer decision to fit this guilt phase claim, it also subtly changed it to increase the threshold showing that a habeas petitioner must make to establish a "miscarriage of justice" under its standard. The Court in Sawyer quite clearly--and apparently quite deliberately--stated the question was whether a reasonable juror "would" find the defendant eligible for the death penalty, see Sawyer v. Whitley, 112 S.Ct. at 2523. The Court of Appeals below equated Sawyer's test with that of Jackson v. Virginia, 443 U.S. 307 (1979), which measures the sufficiency of evidence at trial to support a conviction and holds that proof of guilt is constitutionally insufficient only where no rational factfinder "could" have found all elements proved beyond a reasonable doubt. 443 U.S. at 319; see Wright v. West, 112 S.Ct. 2482, 2485 (1992).

Although the Court of Appeals did not explicitly state that it was equating Sawyer's standard with Jackson's, the logic of its decision made clear that it was doing so: it held dispositive the fact that there was eyewitness testimony supporting Petitioner's conviction, and refused to examine the credibility of that

testimony or weigh it against contrary evidence. This is what it said:

> At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in Herrera, does not provide a forum for the retrial of a convicted felon. Herrera v. Collins, 113 S. Ct 853, 860-61 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty. Therefore, there is no basis for sustaining the motion for stay, Delo v. Blair, 113 S. Ct. 2922 (1993), or for reversing the district court.

App. A-6-7. The dissenting judge took a different view, observing that a jury, upon hearing the additional evidence, might well be compelled to acquit Mr. Schlup: "Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit." Appendix A-24, n. 8 (Heaney, J., dissenting).

The Court of Appeals' equation of Sawyer with Jackson overlooks the careful language the Court used in announcing its decision in Sawyer. The Court in Sawyer said, quite explicitly and apparently deliberately, that the test was whether, in the absence of constitutional error a "reasonable juror would find [the petitioner] eligible for the death penalty." Sawyer v. Whitley,

112 S.Ct. at 2523. Although, as Chief Judge Arnold observed in his dissent below, that language is "quite close" to the sufficiency of the evidence test in Jackson v. Virginia, its difference is critical. For, under Jackson, a conviction cannot stand consistent with the Sixth Amendment if there is not sufficient evidence to support all its elements, beyond a reasonable doubt. If Sawyer's test is the same as Jackson's, in every case where the Sawyer could be met, the conviction would be separately unconstitutional because of the insufficiency of the trial evidence.

Mr. Chief Justice Rehnquist, writing for the majority in Sawyer, considered the question of whether the miscarriage of justice standard should be based on what the jury "would" find, as opposed to what it "could" find, and opted for the former:

> The Court of Appeals in this case took the middle ground among these three possibilities for defining "actual innocence" of the death penalty, and adopted this test:
>
> "We must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." 945 F. 2d, at 820 (footnotes omitted).
>
> * * * *
>
> The Eleventh Circuit articulated the following test:
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> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is ineligible for the death penalty." Johnson v. Singletary, 938 F. 2d 1166, 1183 (CA11 1991) (emphasis in original).

Sawyer v. Whitley, 112 S. Ct. at 2524 and 2525, n.15. (emphasis added). Having examined the two alternatives, the Court adopted the standard employed in the fifth circuit:

> Therefore we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.

At least five times in his opinion, the Chief Justice refers to the standard being adopted by the court as whether a reasonable juror "would find the defendant eligible for the death penalty." 112 S.Ct. at 2524-25.

Though the distinction may seem subtle, in practical application, it is of critical importance. Under the standard adopted by the court below, positive evidence of innocence could never satisfy the test because the record of conviction is presumably based upon evidence that the jury could believe. Under this standard, if Mr. Schlup's evidence had consisted of a videotape of the crime itself, showing that Mr. Schlup was not involved, the court would still be bound to deny consideration of the petition because of the identification testimony in the record, no matter how impeachable it might be.[7] Any case based on eyewitness testimony, no matter how unreliable, must be denied under the standard below, which under all circumstances prohibits consideration of positive evidence of innocence.

[7]In this case, in light of the affidavit of former Corrections Officer Robert Faherty, see Appendix E, the surveillance videotape is the substantial equivalent of a videotape of the actual crime.

That this Court did not intend the application of such a harsh standard is evident not only in Sawyer, but in the past decisions of this Court cited with approval by the Chief Justice in Sawyer. In particular, he noted the analysis of Justice O'Connor in Smith v. Murray, 477 U.S. 527 (1986), in which the Court decided that "the habeas petitioner in that case had failed to show actual innocence of the death penalty because the 'alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.' Id., at 538." 112 S.Ct. at 2519. The standard applied below completely disables the court even if constitutional error precludes the development of true facts, yet Justice O'Connor's words clearly continue to be an important part of the Court's jurisprudence. Likewise, the Kuhlmann test clearly envisions the more flexible, balanced approach described by Justice O'Connor in which all the evidence is examined:

> "The prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'"

Kuhlmann v. Wilson, 477 U.S. at 455, n.17. (emphasis added). Even the example of a claim that the Chief Justice recognized as potentially satisfying the guilt/innocence miscarriage of justice test would be dead on arrival under the standard applied below:

> A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative and admissible evidence negating the element of intent.

Sawyer v. Whitley, 112 S.Ct. at 2522.

We believe the Court of Appeals majority has gone beyond what this Court carefully said in Sawyer, and set a standard that is impossibly high. In effect, the panel's standard would make it impossible to preserve a claim of constitutional error by establishing a "miscarriage of justice", in any case where the evidence was sufficient to convict. This would preclude a finding of a miscarriage of justice even in the archetypical case--which this case approximates--in which there is indisputable, photographic evidence showing the defendant was not guilty, so long as there was some other evidence that showed he was. Since jurors may infer guilt from implausible claims of innocence, see Wright v. West, supra, this would mean no defendant who testified in his own behalf could ever later claim a "miscarriage of justice" even if he produced evidence which established his innocence with scientific certainty.

We do not believe that this is what the Court intended, even if it meant to extend Sawyer's test to guilt and innocence claims. Had the Court meant to adopt Jackson's standard, it could easily have done so. But its careful choice of language suggests that it had in mind the rationale of the rule it was applying: avoidance of executions which are clearly wrongful, despite the existence of evidence which is technically sufficient to justify them. Such miscarriages of justice surely can occur as easily from the omission of plainly exculpatory evidence, as from the admission of evidence which is constitutionally improper.

If Sawyer's test does supplant Kuhlmann's generally, at least it must be given the flexibility the Court apparently intended, to achieve the purpose the Court was seeking. Certiorari should be granted here to clarify that.

III. CERTIORARI SHOULD BE GRANTED HERE TO DETERMINE WHAT CONSTITUTES THE "TRULY PERSUASIVE" SHOWING OF INNOCENCE WHICH REQUIRES AN EVIDENTIARY HEARING TO DETERMINE IF A PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT.

The Court, in Herrera v. Collins, supra, assumed that the execution of a prisoner who can make a truly persuasive showing of innocence would violate the constitution:

> I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed -- "contrary to contemporary standards of decency," post, at 1 (dissenting opinion) (relying on Ford v. Wainwright, 477 U.S. 399, 406, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)), "shocking to the conscience," post, at 1 (relying on Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952)), or offensive to a "' "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," '" ante, at 16 (opinion of the Court) (quoting Medina v. California, 505 U.S. . . . . (1992) [*49] (slip op. 7-8), in turn quoting Patterson v. New York, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)) -- the execution of a legally and factually innocent person would be a constitutionally intolerable event.
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> * * * *
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> Exercising restraint, the Court and JUSTICE WHITE assume for the sake of argument that, if a prisoner were to make an exceptionally strong showing of actual innocence, the execution could not go forward. JUSTICE BLACKMUN, in contrast, would expressly so hold; he would also announce the precise burden of proof. Compare ante, at 26 (opinion of the Court) (We assume, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim"), and ante, at 1 (WHITE, J., concurring in judgment) (assuming that a persuasive showing of actual innocence would render a conviction unconstitutional but explaining that, even under such an assumption, "petitioner would at the very least

> be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond reasonable doubt.' Jackson v. Virginia, 443 U.S. 307, 314, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)"), with post, at 14 (dissenting opinion) ("I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent"). Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations. Indeed, as the Court persuasively demonstrates, ante, at 7-26, throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency.

113 S.Ct. at 874. (O'Connor, J., concurring).

This case squarely presents the troubling question left open by the Court in Herrera -- when has a prisoner made a truly persuasive showing of innocence that would satisfy a constitutional prohibition against executing an innocent person? Despite the disagreements regarding the strength of Petitioner's evidence of innocence, all the judges below agreed that it presented a case for innocence even stronger than that came before this Court in Herrera v. Collins:

> Lloyd Eugene Schlup has presented truly persuasive evidence that he is actually innocent of the murder of his fellow inmate Arthur "Stump" Dade. Five eyewitnesses to the murder have provided sworn testimony that Schlup neither participated in the murder nor was present at the time. Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so. Consequently their testimony was not heard by the jury that convicted Schlup and sentenced him to death. Moreover, their testimony has not been heard in open court since the trial because neither the Missouri courts nor the federal courts have been willing to grant Schlup an evidentiary hearing in which this new evidence could be heard and evaluated.

App. A-13. (Heaney, J., dissenting).

> [T]he district court indicated that Schlup has presented a stronger case than did Herrera in that Schlup's affidavits do not consist of hearsay but of eyewitness testimony, and Herrera was, in the opinion of the district court, "convicted on the basis of a larger quantity of evidence than was presented at [Schlup]'s trial." Schlup v. Delo, No. 4:92CV00443, slip op. at 11 (E.D. Mo. Aug. 23, 1993).

Ibid. at 33.

The judges below assumed that Herrera v. Collins envisioned that, in some circumstance, a showing of innocence could preclude an execution under the Eighth Amendment. See Appendix A at A-11-12. As Chief Judge Arnold wrote:

> As I understand the various opinions in Herrera v. Collins, 113 S.Ct. 853 (1993), a majority of the Court appears to believe that, in a sufficiently strong case, innocence would be a ground for habeas relief,. The case would have to be "truly persuasive" and "extraordinary." We know that these standards were not met in Herrera itself or in Delo v. Blair, 113 S.Ct. 2922 (1993) (per curiam). In Blair, a stay of execution was dissolved on the ground that the evidence of innocence was no more persuasive than that presented in Herrera.
>
> In my view, it is likely that Schlup's evidence of innocence is substantially more persuasive than Herrera's or Blair's. I am not nearly so familiar with the record as the members of the panel, but Judge Heaney's dissent convinces me that there is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high Herrera standard if an evidentiary hearing were held. To be sure, there are contradictions in both sides' evidence, and I agree with the panel that, even after all of the new evidence is considered, a reasonable jury could still find Schlup guilty. In this sense, the Herrera standard seems easier to meet than the Sawyer standard, which is quite close to that of Jackson v. Virginia, 443 U.S. 307 (1979). In other words, under Herrera, if evidence is newly discovered, a habeas petitioner could obtain relief by making a "truly persuasive" or "extraordinary" case, even if, after

> considering the new evidence, a reasonable jury could still convict him.

The panel majority, however, appeared to equate the Herrera standard with Jackson's--finding its determination of the Sawyer issue dispositive of the separate Eighth Amendment claim.[8] The majority did this by discounting much of Mr. Schlup's new evidence, despite the fact that the witnesses themselves had never been heard or evaluated in any forum.

> Herrera points to the resolution of Schlup's claim. As we have just discussed in part II-A, when the new evidence itself is analyzed with its inconsistencies and weaknesses, and considered together with the evidence before the jury at the trial of the case, the extraordinarily high burden is not met, and there is no truly persuasive demonstration of actual innocence.

Appendix A-12 (emphasis added).

As we have noted above, under the circumstances the "inconsistencies and weaknesses" of the evidence showing Petitioner's innocence are remarkably few. Although the eyewitnesses are prisoners, most are black prisoners with no reason to protect Mr. Schlup, a white man accused of the race-motivated

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[8]One of the Circuit judges--the author of the opinion below--offered an alternative rationale for denial of Mr. Schlup's Herrera claim: Judge Beam stated his own view that

> Mr. Schlup cannot, under the holding in Herrera, seek federal habeas relief based upon this "free standing" claim without first seeking executive clemency from the Governor of Missouri. It is my view that in Herrera, at least five members of the Supreme Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, and Thomas) would permit a federal habeas remedy based upon an "actual innocence" claim arising from newly discovered evidence rather than trial error (assuming such a remedy even exists when the question reserved for future consideration is answered) only "if there were no state avenue open to process such a claim." Herrera, 113 S. Ct. at 869, 874.

killing of a black victim. Many of those prisoners made statements to investigating authorities, shortly after the crime, consistent with what they now say; but none were ever heard by the trial jury. Although some of them denied knowledge at the time, as Judge Heaney noted, their reasons for doing so may be easily understood. See Appendix A-14-15, n.2. More importantly, the testimony of these witnesses is strongly corroborated by the physical evidence, gathered immediately after the murder took place, and in a videotape that, in light of the contemporaneous statements of witnesses, shows Mr. Schlup to have been in another place.

The observation below that Mr. Schlup's case is distinguishable from Herrera because the evidence of his innocence is stronger, while the evidence of his guilt is weaker than that in Herrera, understates the distinction between the facts of these cases. There is not a single criticism that can be made against the case for Mr. Schlup's innocence that does not apply with equal or greater force to the state's case. Although some (but not all) of Mr. Schlup's witnesses are convicted felons, the state's two essential witnesses are subject to similar challenges to their character. One is a three-time felon; the other is a drug addict. As for prior inconsistent statements, the state's case is riddled with them. Although Roger Flowers claims that he broke up the fight, John Maylee, who claims that he saw the whole fight from beginning to end, never saw Flowers at the scene. Before the video-tape was discovered, Flowers said that Mr. Schlup fled toward the locked end of the walk, in the opposite direction from the

dining room, and that Dade was carried out of the housing unit before he took Rodnie Stewart downstairs and notified Captain Eberle of the fight. When the video tape revealed that Mr. Schlup was first in line for lunch, and had been in the dining room for a minute and five seconds before the radio call was sent out, and a minute and a half before Dade was carried out of the housing unit, Flowers changed his story. At trial, he said that he did not see where Mr. Schlup went, and he said that he took Stewart downstairs before Dade was carried out. Trial counsel did not bother to prove that Flowers had ever said anything different. There are many other discrepancies in their testimony.

There is a reasonable explanation for the reluctance of inmates to come forward and snitch while the real perpetrator lived among them. However, the only reasonable explanation for the numerous contradictions in the testimony of John Maylee and Roger Flowers is that Mr. Schlup is wrongly accused of the crime.

Another aspect of this case which sets it apart from Herrera is the role of physical evidence. Every aspect of Mr. Schlup's innocence is corroborated by physical evidence. The video-tape backed up his statement, and the testimony of Bernard Bailey and Arthur St. Peter, that he went straight to lunch that day. The absence of any trace of blood on his clothing corroborates his claim that he was not involved in the stabbing.[9]

[9]At Mr. Schlup's trial, the state tried to downplay the amount of blood at the scene of the crime. At Mr. Stewart's trial, Officer Maylee testified that he vomited for nearly an hour after seeing all the blood.

By contrast, the state's case is remarkable for the absence of corroboration--evidence which, if Mr. Schlup were guilty, the state should be able to produce. The state's refutation of Mr. Schlup's video-taped alibi depended upon the assumption that Captain Eberle was the first officer who reported the stabbing; radio logs maintained by the prison would have recorded the time of the call and the identity of the caller.[10] It is also undisputed that the attackers left the housing unit after most of the inmates had gone to lunch, meaning that Mr. Schlup had to run through the crowd and cut in at the head of the line. There were at least two officers stationed between the housing unit and the scene of the crime, both of whom would have seen him do this. One of these officers is Lt. Faherty, who says that Mr. Schlup was the first prisoner coming out of the housing unit, walking at a leisurely pace. The other officer, Curtis Bittle, likewise saw nothing unusual.[11] Again, the video-tape reveals that Officer Faherty is telling the truth. Mr. Schlup is not nervous, excited, or out of breath.

Although witnesses on both sides are subject to attacks on their character or credibility, the objective physical evidence in

[10]The dissenting judge below noted that "the absence of these logs is but further evidence of the ineffectiveness of Schlup's trial counsel." App. at 22, n. 6. Since trial, the state has resisted all efforts to obtain these logs.

[11]The hallway between the housing unit and the dining room is long and narrow, and it is divided down the middle by a rail, leaving just enough room for prisoners to walk single file on one side of the rail. Inmates are required to remain to the right of the rail; officers use the left side of the hall. Mr. Schlup could not have run to the head of the line and cut in without being seen by any of several officers on duty in that hallway.

this case points only one direction--toward Mr. Schlup's innocence. The only flimsy corroboration the state can muster is a photograph of a small scratch on Mr. Schlup's neck, which during his interrogation he attributed to scratching a pimple.

It is difficult to realistically imagine a more persuasive initial showing of innocence. It is simply not realistically possible that anyone convicted of a capital crime could present evidence which demonstrated their innocence, wholly free from any "inconsistency or weakness". It is inevitable there will be trial evidence that contradicts some aspect of what is presented; and there will always be doubts raised by the simple fact that the witnesses did not come forward earlier.

The categorical rejection of this testimony by the courts below was inconsistent with the general principle that, in habeas cases as others, credibility is generally to be determined by the traditional means of testimony under oath, and cross-examination. See Keeney v. Tamayo-Reyes; Townsend v. Sain, 372 U.S. 293, 312-13 (1963); Ford v. Wainwright, 477 U.S. 399, 410 (1986). Under the usual rules of summary judgment, Mr. Schlup's submissions would have to be considered true until and unless they were found incredible by some finder of fact.

> The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

Townsend v. Sain, 372 U.S. 293, 312 (1963).[12] Although there may be justifications for expediting the process of evaluating such claims, when they are brought in the days before a scheduled execution, surely it was not the Court's intent in Herrera that established mechanisms for determining the truth would be abandoned in such circumstances, altogether.

The logic of the Court of Appeals opinion, which would make such flaws fatal to any Eighth Amendment claim, must lead inevitably to a conclusion that no innocent person could ever be convicted of a capital crime and sentenced to death. Unfortunately, we know that is not true:

> One impressive study has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984. Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173-179 (1987); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282-356 (1992). The majority cites this study to show that clemency has been exercised frequently in capital cases when showings of actual innocence have been made. See ante, at 24. But the study also shows that requests for clemency by persons the authors believe were innocent have been refused. See, e. g., Bedau & Radelet, 40 Stan. L. Rev., at 91 (discussing James Adams who was executed in Florida on May 10, 1984); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence, at 5-10 (same).

113 S. Ct. at 878, n.1. The processes of capital trials and review, like all human institutions, are not perfect. See McCleskey v. Zant, 481 U.S. 279, 313 (1987). The Court in Herrera recognized that the same is true of clemency:

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[12]A hearing on an otherwise abusive claim can be dispensed with "if the district court determines as a matter of law that petitioner cannot satisfy the standard." McCleskey v. Zant, 499 U.S. 467, 494 (1991) (emphasis added).

> Although we do not doubt that clemency -- like the criminal justice system itself -- is fallible, we note that scholars have taken issue with [the Bedau-Radelet] study. See Comment, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988).

113 S.Ct. at 868, n. 15.

Neither, of course, are the perceptions of federal courts reviewing claims of innocence brought to forestall impending executions. But if such claims are to be entertained, at least where they reach the "extraordinary" level of persuading several federal judges that a death-sentenced petitioner is actually innocent of the crime--they should be subjected to the most effective mechanisms for ascertainment of the truth available. Traditionally, that has included live testimony, subject to cross-examination. In a habeas corpus proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Townsend v. Sain, 372 U.S. 293, 312-313 (1963). Where, as here, all of the opinions in the courts below are skeptical of the state's witnesses as well as petitioner's, a hearing is essential to the protection of the important constitutional interests at stake. Where the case turns on the credibility of eyewitnesses to the crime, the observations of Justice O'Connor are particularly applicable to the role of the court which must resolve the dispute:

> A hearing permits counsel to probe the [witness'] memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.

Smith v. Phillips, 455 U.S. 209, 221 (1982) (O'Connor, J., concurring).[13] No less is required here where numerous eyewitnesses provide direct testimony of petitioner's innocence, and that testimony is corroborated by physical evidence which includes a video-tape which is, upon review of the totality of the record now available, conclusive proof of Petitioner's defense of alibi.

Mr. Schlup's witnesses have never been put to that test. Unless they are lying, Mr. Schlup was not involved in this crime. Their statements are as consistent as can realistically be expected, with each other and with the indisputable physical and recorded evidence of the circumstances surrounding the crime. It is undisputed that the murder occurred on a crowded cell block before many witnesses. Not one single prisoner, Black or White, has implicated Mr. Schlup in the killing of Arthur Dade. Petitioner submits that any inconsistency in the affidavits of the prisoners is due simply to the variance of statements one would obtain about any event seen by a large number of people. If such a preliminary showing is not enough even to have a court listen to that testimony, and evaluate it individually rather than categorically, it is hard to imagine a case in which the Eighth and Fourteenth Amendments could actually prevent a wrongful execution.

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[13]The witness at issue in Phillips was a juror testifying about her own bias. The legal issue was whether a hearing would yield reliable results, or whether the doctrine of "implied bias" should be applied.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was mailed this 14th day of February, 1994, to:

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